INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Argument	6
Conclusion	11

CITATIONS

Cases:

Chippewa Indians v. *United States*, 301 U.S. 358	10
Choate v. *Trapp*, 224 U.S. 665	7, 9
Gritts v. *Fisher*, 224 U.S. 640	8, 9
Klamath Indians v. *United States*, 296 U.S. 244	10
Lane v. *Pueblo of Santa Rosa*, 249 U.S. 110	10
Lowe v. *Fisher*, 223 U.S. 95	9
United States v. *Creek Nation*, 295 U.S. 103	10
United States v. *Mille Lac Chippewas*, 229 U.S. 498	10
Wallace v. *Adams*, 204 U.S. 415	9

Statutes:

Act of June 28, 1898:	
sec. 11, 30 Stat. 497	2
sec. 21, 30 Stat. 405, 502	2, 6
sec. 29, 30 Stat. 495, 505	5, 6
Act of July 1, 1902, secs. 30, 35, 32 Stat. 641, 646, 649	3, 5, 6, 9
Act of April 26, 1906, sec. 2, 34 Stat. 137, 138	4, 7, 9
Act of August 1, 1914, sec. 17, 38 Stat. 582, 600	5, 6, 7, 9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 679

THE CHOCTAW NATION, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Indian Claims Commission (R. 4-13) is not reported. The opinion of the Court of Claims (R. 16-27) is reported at 100 F. Supp. 318.

JURISDICTION

The judgment of the Court of Claims was entered on October 2, 1951 (R. 28). A motion for new trial was denied on December 4, 1951 (R. 28). On February 26, 1952, the Chief Justice extended the time for filing a petition for a writ of certiorari

to April 2, 1952 (R. 28). The petition for writ of certiorari was filed on March 28, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1255(1).

QUESTION PRESENTED

Whether enactment of a statute providing that the jurisdiction of the Secretary of the Interior to approve enrollment of Indians on the rolls of the Choctaw Nation should end March 4, 1907, prevented Congress in 1914 from authorizing him to add other Indians to the rolls and to make payments to them from the undistributed funds of the tribe.

STATUTES INVOLVED

1. Section 21 of the Act of June 28, 1898, 30 Stat. 495, 502, provides in part:

> Said commission[1] is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.
>
> * * *

[1] Identified in section 11 of the Act, 30 Stat. 497, as the "Dawes Commission".

Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. * * *

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

2. The Act of July 1, 1902, 32 Stat. 641, 646, 649, provides in part:

Section 30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freed-

men, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. * * *

* * *

Section 35. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: * * *.

3. A proviso to section 2 of the Act of April 26, 1906, 34 Stat. 137, 138, declares:

That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: * * *.

4. Section 17 of the Act of August 1, 1914, 38 Stat. 582, 600, provides in part:

> The Secretary of the Interior is hereby authorized to enroll on the proper respective rolls of the Five Civilized Tribes, as indicated, the persons enumerated in Senate Document Numbered Four hundred and seventy-eight, Sixty-third Congress, second session: *Provided,* That when so enrolled there shall be paid to each and every such person out of the funds in the Treasury of the United States to the credit of the respective tribe with which such person is enrolled the following sums in lieu of an allotment of land: To each such person placed * * * on the Choctaw * * * rolls, a sum equal to twice the appraised value of the allotment of such tribe as fixed by the Commission to the Five Civilized Tribes for allotment purposes: * * *.

STATEMENT

This proceeding was commenced by the filing with the Indian Claims Commission of a petition (R. 1-2) asserting a violation of the so-called Atoka Agreement incorporated in section 29 of the Act of June 28, 1898, 30 Stat. 495, 505, and of the Supplemental Agreement made law by the Act of July 1, 1902, 32 Stat. 641. The petition alleged that these statutes had provided for compiling rolls of the members of the Choctaw Tribe and for distributing the properties of the Tribe to those en-

rolled. It further alleged that these rolls "became final and the persons whose names were found thereon alone constituted the membership of the Tribe." It finally alleged that thereafter section 17 of the Act of August 1, 1914, 38 Stat. 582, authorized the Secretary of the Interior to add 41 names to the rolls and to pay them $41,000 from the tribal funds without petitioner's assent. The petition asked judgment for $41,000 plus interest, on the ground that the 1914 Act was "a confiscation of the tribal domain by an unauthorized enlargement of the plenary and political power of Congress" (R. 14).

The Government's motion to dismiss (R. 3) was sustained by the Commission (R. 13) on the ground that enactment of the Act of August 1, 1914, was a legitimate exertion of the Government's administrative control over the tribal property (R. 4-13). The Court of Claims affirmed (R. 28).

ARGUMENT

1. Petitioner invokes (Pet. 6, 20) the parts of section 21 of the Act of June 28, 1898,[2] and of sections 30 and 35 of the Act of July 1, 1902 (pp. 3-4, *supra*) which provided for the making of member-

[2] As the text indicates, section 21 of the Act of June 28, 1898, is relied on by petitioner. Despite its intimations to the contrary (Pet. 6, 7, 13, 20), the Atoka Agreement, incorporated in section 29 of that Act, is not involved here. None of its provisions relates to the enrollment of members of the Choctaw tribe.

ship rolls by the Dawes Commission and their approval by the Secretary of the Interior and which contemplated (see sec. 30) the completion of those rolls "when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment". Next, petitioner—without citing the enactment—necessarily assumes that the proviso to section 2 of the Act of April 26, 1906 (p. 4, *supra*), directing full completion of the rolls by March 4, 1907, and prohibiting the Secretary from approving enrollments thereafter, amounted to a determination by the United States that as of that date all those lawfully entitled to enrollment had been enrolled. Upon this implicit assumption, petitioner contends (see e.g. Pet. 5, 7, 10, 19) that those on the rolls on March 4, 1907, had a vested right to the undistributed money of the tribe. In consequence, it concludes (Pet. 11, 12-13, 19) that when by section 17 of the Act of August 1, 1914 (p. 5, *supra*), the Secretary of the Interior was authorized to add to the rolls additional names and to pay to those named a part of the fund, the United States confiscated tribal money.

Petitioner's contention is thus premised on the notion that the Acts of June 28, 1898, and July 1, 1902, were contracts with it which the United States had no right to change without its consent (see e.g., Pet. 3, 4, 5, 6, 7, 19). There is no warrant for this view. As this Court pointed out in *Choate* v. *Trapp*, 224 U.S. 665, 671:

> The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.
>
> This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the Tribes. For, although the Atoka Agreement is in the form of a contract it is still an integral part of the Curtis Act and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress.

Again in *Gritts* v. *Fisher*, 224 U.S. 640, in dealing with a cognate statute applicable to the Cherokee tribe, the Court said (p. 648):

> The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." * * * It was but an exertion of the administrative control of the Government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect and while the tribal relations continued.

The mere enactment in 1898 and 1902 of the provisions relied on by petitioner did not create vested rights. They simply prescribed procedures for the compilation of the tribal rolls and made enrollment prerequisite to a share in the tribal property. And while Section 30 of the 1902 Act contemplated a completion of the rolls it set no time limit upon their preparation.

It is true that the proviso to Section 2 of the 1906 Act directed that the rolls be fully completed by March 4, 1907, and deprived the Secretary of the Interior of jurisdiction to add any names to the rolls after that date. But like the 1898 and 1902 Acts, this was "a public law relating to tribal property, and as such was amendable and repealable at the will of Congress". *Choate* v. *Trapp*, 224 U.S. 665, 671. Thus, the 1906 Act was not a grant of a proportionate part of the undistributed tribal property in the custody of the United States to those who were on the rolls on March 4, 1907. And, since the Choctaw Nation had not been freed from governmental control, the United States was fully empowered, if it seemed wise to do so, to determine later that the tribe had other members and to allot and distribute tribal property to them. *Wallace* v. *Adams*, 204 U.S. 415, 423; *Lowe* v. *Fisher*, 223 U.S. 95, 102, *et seq.*; *Gritts* v. *Fisher*, 224 U.S. 640. That is what was done by Section 17 of the Act of August 1, 1914. In authorizing the Secretary of the Interior to add names to the rolls and to make payments to them from the undistributed funds of

petitioner, the United States merely exerted its administrative control over the tribal property of tribal Indians. Its actions in that capacity are not subject to judicial review. *Klamath Indians* v. *United States*, 296 U.S. 244, 252-253, 254-255, and cases cited.[3] Accordingly, the judgment of the Court of Claims affirming dismissal of the petition was correct.

2. The Court of Claims declined to accept the foregoing argument. Instead it expressed the belief that the Choctaws whose names appeared on the rolls "when they were closed in 1907" were vested with an interest in the undistributed property (R. 21) and that after that date Congress could not change the criteria for membership (R. 22). However, upon consideration of the legislative history of Section 17 of the Act of 1914 of which it took judicial notice (R. 22-26), the court concluded (R. 26): "By the Act of August 1, 1914 (Section 17) it [Congress] did not alter in any respect the criteria for membership which had been applied to those who were on the rolls in 1907. It

[3] Where, unlike the situation here, the United States has departed from the role of guardian and treated tribal property as governmental property, it assumes an obligation to make just compensation. See e.g., *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 509-510; *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113; *United States* v. *Creek Nation*, 295 U.S. 103, 110-111; *Chippewa Indians* v. *United States*, 301 U.S. 358, 375-376, cited by petitioner at pp. 12-13. Obviously, these cases are not in conflict with the judgment below.

merely added to the rolls a group of people who met all the tests applied to those whose names had been placed on the 1907 rolls."

Petitioner contends (Pet. 5, 13-14, 16-19) that since the record contained no evidence on this question of fact it should not have been determined by the Court of Claims. Whatever the merits of this contention, it is clear—for the reasons already set forth—that the judgment below is correct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

WM. AMORY UNDERHILL,
Assistant Attorney General.

JOHN F. COTTER,
EDMUND B. CLARK,
Attorneys.

MAY 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—205086/P.O 1153